FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 115

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,
Petitioner,

vs.

HORACE HAVEMEYER ET AL. (Russell & Co., Suers., S. en C.),
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND SUPPORTING BRIEF

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, the Public Service Commission of Puerto Rico, prays a Writ of Certiorari to review the final decision and judgment of the Circuit Court of Appeals for the First Circuit, January 10, 1935, in the above case reversing the judgment of the Supreme Court of Puerto Rico which had affirmed that of the insular District Court of San Juan in this case affirming the unanimous order of the Public Service Commission (R. 29-30, 67) repealing

"that part of franchise No. 5 which refers to the use of certain water of Guanica Lake for purposes of irrigation, granted by the former Executive Council of Puerto Rico on March 19, 1901, entitled 'A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica';

"Provided that this cancellation shall become effective June 30th, 1929. It is understood, furthermore, that in the meantime the parties in interest are at liberty to file any further petition which they may deem convenient for the use of the waters of Guanica Lake, by submitting to this Commission specific data with regard to the highest level of the waters of the Lake, as well as the plans of any other works, in order that this level may be permanently kept."

The time for petitioners to apply for a Writ of Certiorari was extended sixty days by order of Mr. JUSTICE BRANDEIS until June 9, 1935 (R. 107).

QUESTIONS PRESENTED

The principal question here involves the scope of the "judicial power of the United States" under Article III of the Constitution.

Does the judicial power extend to the review by a constitutional court of the United States of the "reasonableness" of an order of a public service commission repealing a public utility franchise in accordance with a clause in the original franchise accepted by the grantee expressly reserving the power to repeal it, inserted in the franchise pursuant to a requirement of an Act of Congress?

Another question is whether the six individual respondents here,—the appellants in the Circuit Court of Appeals,—are parties in interest entitled to maintain an appeal from the order of the Public Service Commission of Puerto Rico, and particularly to maintain an appeal from

the insular Supreme Court to the Circuit Court of Appeals, in the absence of the corporate entity, the *Sociedad en Comandita,* Russell & Co., Sucrs., S. en C., which alone appears to claim any title to the franchise involved.

STATEMENT

On March 19, 1901, the former Executive Council of Puerto Rico granted a franchise to the Guanica Land Company of New Jersey for the construction, maintenance and operation of

> "a dam of masonry work or other proper materials across the Cano Negro, or outlet from the Lake of Guanica, * * * for the purpose of retaining, storing and conserving the waters of the said Lake of Guanica, and of restraining and regulating the flow of the water from said Lake, through the said Cano or otherwise, for the purposes hereinafter set forth" (Par. I, R. 9-10),

and to take therefrom not exceeding 20,000,000 gallons of water a day for the irrigation of its own lands, to

> "be taken by gravity through proper channels, or by pumps, or by any other method that might be advisable, or by any two or more of such methods" (Par. II, R. 10),

and permitting the company or its successors or assigns to construct, operate and maintain on those parts of its lands lying

> "within six meters of the bank of the said Cano or within twenty meters of the shore of the said Lake or of the harbor or bay of Guanica, such pumping station, channels and pipe lines as may be necessary or proper for the taking or conveyance of said waters" (Par. III, R. 10),

but providing that no public road should be obstructed, and (Par. IV, R. 10-11):

> "That nothing herein contained shall be held or construed to authorize or permit the said Company or its successors or assigns to raise or maintain the level of the waters of said lake of Guanica above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall; and all damage sustained by abutting owners by reason of unduly raising the level of the waters of said Lake, shall be borne by the said Company, its successors and assigns and action for damages shall lie against said Company, its successors and assigns for such damage by such abutting owners, in any court of competent jurisdiction";

and authorizing the company also to construct, maintain and operate a line of standard gauge railway within six meters of the bank of the Cano or within twenty meters of the shore of the Lake of Guanica or of the harbor or Bay of Guanica for the transportation only of the company's own property and of its agents and employees, and also to construct and operate and maintain a dock or wharf in the harbor or Bay of Guanica likewise only for the company's own purposes, and not for hire; and providing also that (Par. XI, R. 13)

> "the said Company and its successors and assigns are hereby authorized to construct and maintain such other works as may be necessary for the proper operation of the said dam, channel, pipe lines, pumping stations, railway and wharf or dock or any of them";

but requiring the company to allow the use of the railway and wharf to the Federal and Insular Governments without compensation; giving it the power of eminent domain (Par. XIII, R. 13); and specifically requiring also that (Par. XIV, R. 13-14):

"Before any of the work herein authorized shall be begun, the plans for the same shall be submitted to and approved by the Commissioner of the Interior for the Island of Porto Rico, and all material and construction shall be subject to inspection by him and his agents. After such plans shall have been approved by the said Commissioner no material change or modification shall be made therein, unless the same shall be authorized or directed or approved by the Executive Council, or by the said Commissioner or his agents";

requiring formal written acceptance within ninety days and that the work be begun within sixty days and completed within one year (Par. XV, R. 14); and prohibiting the company from using water from the Lake for irrigation of any except its own lands (Par. XXI, R. 15); reserving to the Executive Council (Par. XXII, R. 15)

"the right at any time * * * to declare the said Company, its successors and assigns, a common carrier with respect to said railroad and wharf";

providing further that (Par. XVIII, R. 15)

"in accordance with Section 3 of Public Resolution No. 23, approved May 1st, 1900, it is hereby provided that the franchises, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal";

and that (Par. 17, R. 14)

"The franchises, concessions, rights and privileges hereby granted, or any one or more of them, may be assigned and transferred in whole or in part by the said Guanica Land Company, and by its successors and assigns, and it and they may grant license in respect thereto, every such assignee and licensee, unless otherwise provided by the instrument of assignment or grant, shall succeed to and acquire all the rights, liberties, privileges, power and authority herein granted or conferred upon the said Company, and shall also be bound by and obligated to the observation and per-

formance of all terms, conditions, agreements and stipulations herein contained, so far as the same are applicable to such assignment or grant."

By Section 38 of the Organic Act of 1917 (Act of March 2, 1917, c. 145, 39 Stat. 964) the powers of the Executive Council in relation to franchises were transferred to the Public Service Commission created by that act; and by Section 55 of the "Public Service Act of Puerto Rico", Act No. 70, December 6, 1917, it was provided that (Laws of Puerto Rico, 1917, Vol. II, p. 514):

> "No sale, transfer, purchase, acquisition, taking or holding, either in absolute ownership or in pledge, directly or indirectly, of any franchise, right, privilege or concession granted for public or quasi-public uses, shall be effective until approved by the commission."

The Guanica Land Company, original holder of the franchise, assigned it to the Guanica Centrale; and that assignment was approved by the Executive Council on October 31, 1901 (R. 17). The latter company "was extinguished" (R. 17) on June 30, 1917; and it does not appear that any assignment of the franchise by it to anyone was ever approved or authorized by the Executive Council or the Public Service Commission; but under date of July 18, 1917, Ensenada Estates, Inc., petitioned the Commission for approval of an assignment to "the limited partnership of Russell & Company", but approval was denied on January 13, 1918 (R. 17). Russell & Company, Sucrs., S. en C., *sociedad en comandita,* "a civil agricultural partnership organized in accordance with the laws of Puerto Rico" (Answer of Russell & Company, Sucrs., S. en C., to the Commission's Order to Show Cause, R. 26), now claims (*answer, supra,* Par. I; R. 26-27);

> "That on or about the 15th day of March, 1917, the corporation Guanica Centrale, which at the time was the owner of the franchise to which the order to show cause herein refers, assigned and granted for value

> received to the corporation Ensenada Estates, Inc., a corporation of the State of Connecticut, **all of that part of said franchise and of the rights therein contained, referring to the use of certain waters of Guanica Lake for purposes of irrigation, that is to be more specific, the rights contained under paragraphs I and IV, inclusive of said franchise**; and that subsequently, v.g., on or about the 29th day of June, 1917, the said corporation Ensenada Estates assigned and **granted for value received to the partnership appearing herein, the above mentioned part of said franchise, and that this partnership is at present the owner of all that part of said franchise having to do with the use of water for purposes of irrigation**; that the said assignments or grants were communicated to the Executive Council of Puerto Rico and to the Public Service Commission, and although it is true that they were not approved by said Council and Commission, such approval was unnecessary for their validity inasmuch as the franchise itself authorizes its assignment or grant."

Neither the Guanica Land Company, the original grantee, nor Guanica Centrale, nor Ensenada Estates, Inc. nor Russell & Company, ever complied with the provisions of Section XIV of the franchise requiring as above stated that detailed plans be submitted for the approval of the Commissioner of the Interior before beginning any work under the franchise (R. 13-14; R. 18). Russell & Company admits, in effect, in the last three lines of Paragraph II of its answer to the rule to show cause (R. 27) that no plans were ever submitted; but nevertheless it and its predecessors have taken the 20,000,000 gallons a day of water from the lake to irrigate their lands, and (Russell & Company's *answer, supra* Par. 4; R. 28);

> "in accordance with the provisions of said franchise, this partnership and the former owners of the franchise have spent great sums of money in pipes, pumps, canals and other works for taking and using the water of Guanica Lake";

and in some way the outlet to the Lake has become obstructed so that the former outlet at the head of the Cano Negro, *lying wholly on lands under the control of Russell & Company, the present claimant of the franchise* (Commission Report, R. 36), has become wholly dry land for a distance of some 300 meters (about a thousand feet) from the foot of the Lake, "close to the Lake", "and that after this distance the bed of the old pond" ("Los Negros" or "Cano Negro") "could be seen" (R. 36). That is to say, there is what amounts to a dam, about a thousand feet in width, across the outlet of the Lake into the pond; and (Commission's findings, "Report", R. 36):

> "These lands were under the control of the respondents" (Russell & Co.) "and it was in their own interests to keep the level of the lake as high as possible in order to have a sufficient amount of water so as to plant as large an area of sugar cane as possible."

The level of the Lake has in fact risen several feet above the customary level during the rainy season, as it formerly existed in years of average and usual rain fall, in violation of the restriction contained in Paragraph IV of the franchise (R. 10; *ante*, pp. 3-4), resulting in extensive flooding of low lands in the Lajas Valley to the west of the Lake (Commission report, R. 33-37, approved in its order, R. 29).

This flooded condition did not begin until about 1926, some 25 years after the original grant of the franchise (except that there were brief floods in 1914 and 1922).

On February 24, 1928, the Municipal Assembly of Lajas adopted a resolution finding that (R. 20-21):

> "Whereas the Government of Lajas has received a complaint signed by a number of real estate owners and residents of the ward of Costa of this Municipality wherein they complain of the difficulties created by the flow-back and overflow of the waters of Guanica Lake, which from and after the year 1926 have cut off

and interrupted the communication between two of the principal roads of this jurisdiction, these waters extending at present over the most fertile portion of said ward, thus preventing the cultivation and exploitation of the lands and threatening the public health with the diseases which by reason of this anomalous situation have arisen and have made life inconvenient by reason of the mosquito plagues which have developed in said region;

Whereas the said Guanica Lake has always had as outlet the Negro Pond, which connects it with the sea, and according to information received by this Municipal Assembly, this situation is due to the fact that at the mouth of Negro Pond of the Guanica Lake tree-trunks and walls of ground have been raised, which prevent the flow of water from the lake and have forced and raised the level of the waters to points and heights which they never reached before, and the same had never affected the conditions of this community like they are affecting it at present, nor caused any disease and loss of property, nor any complaints like the one now brought before this municipal body had been filed before;

Whereas this Municipal Assembly has been informed that the works which prevent the outlet of the Guanica Lake and caused the flow-back of the waters have been carried out under the authority of the Executive Council of Puerto Rico or under a franchise of the Public Service Commission, and it is known by this Assembly that the flood or invasion of these waters has cut off the station of the American Railroad Company in the ward of La Plata from the ward of Costa, through roads numbers 9 and 10 of this Municipality, which are known as Fabiani and don Mariano roads, and it is of general knowledge in this municipality that at present and from and after the year 1926, these roads can not be used, and it is necessary to evade them by going around the town of Lajas in order to reach the said railroad station, and all of this causes material injury to this municipality; and

> Whereas it is the unavoidable duty of this municipal organism to protect the health and welfare of its citizens and taxpayers; and in order to procure the health of its people it should always act in such a manner that the community be always safeguarded and defended according to law;"

and directing that complaint be filed with the Public Service Commission of Puerto Rico and with the Commissioner of the Interior of Puerto Rico. (R. 21)

> "that the engineering works carried out on Negro Pond of Guanica Lake are causing irreparable damages to the Municipality of Lajas, by throwing the waters of Guanica Lake beyond their highest level; by invading, as they have, municipal roads numbers 9 and 10 of this jurisdiction, and by making the life of the residents and real estate owners of the wards of Costa and Plata impossible, and in order that an investigation of the case be made by the proper party so as to protect the interest of one of the richest regions of Puerto Rico and the health and life of this community."

The Municipality's complaint was transmitted by the Governor of Puerto Rico to the Public Service Commission. (Letter from the Commissioner of the Interior to the Governor, May 22, 1928, reporting that the Department of the Interior had investigated the causes of flood in the Lajas Valley and that "this special situation has been apparently created by the violation" of some of the provisions of the franchise (R. 23-24); and letter from the Governor to the Public Service Commission, May 22, 1928, R. 22-23). The Commission entered an "Order to Show Cause" (R. 16-19) May 26, 1928, addressed to Russell and Company, Sucrs., S. en C., Ensenada Estates, Inc., Guanica Centrale, and "any other person or legal entity" interested in the franchise. Russell and Company appeared and moved to dismiss the proceeding on the grounds (1) that the Public Service Commission did not have jurisdiction to cancel the franchise, and (2) that

> "none of the parties appearing in this cause is a public service corporation or a public service partnership, or is engaged in any manner in public service, and that this Commission does not have jurisdiction over these parties or over any one of them." (R. 25)

But Russell and Company afterwards, on November 27, 1928, answered generally (R. 26-28) setting up (Par. I) that it was the **assignee and owner of that part of the franchise referring to the use of water** of Guanica Lake for irrigation purposes, that is to say, the rights under Paragraphs I to IV inclusive of the franchise; admitting that the assignment to it, and the *mesne* assignments from the original assignee under which it claims, had not been approved by the Executive Council or the Public Service Commission, but claiming that "such approval was unnecessary for their validity inasmuch as the franchise itself authorizes its assignment or grant"; alleging that (Par. II, R. 27):

> "neither this partnership nor the former owners of that part of the franchise which refers to the use of certain waters has not carried out any works in connection with the taking of water for the use to which said paragraph refers, and that inasmuch as it has not done the said works, it was not necessary or possible to submit plans to the Commissioner of the Interior;"

admitting that the level of the water of the Guanica Lake has been higher than the usual level and that some lands and roads have been flooded but denying that this was caused by any act, blame or negligence of itself or of the former owners of the franchise, "but solely by acts of nature beyond the control of this partnership", and setting up that if any person has suffered damages, the only remedy of such person "is the remedy by suit granted by the franchise itself, and that said reasons do not justify at any time the cancellation of the franchise"; alleging (Par. IV, R. 27-28) that the Executive Council had authority to

grant the franchise and that the franchise is entirely valid and legal; that "this partnership" and the former owners had complied with its provisions, and that (R. 28),

> "acting in good faith and in accordance with the provisions of said franchise, this partnership and the former owners of the franchise have spent great sums of money in pipes, pumps, canals and other works for taking and using the water of Guanica Lake",

and that its cancellation would cause "this partnership" great loss of money and property and would be equivalent to taking its property without due process of law and taking it for public purposes without just compensation, contrary to the Fifth and Fourteenth Amendments and to the Organic Act for Puerto Rico and "to the acts and statutes of Puerto Rico and of the United States"; alleging (Par. V, R. 28) that the Commission "does not have jurisdiction over this partnership", and setting up as a separate defense (Par. VI, R. 28),

> "That although this partnership had no obligation whatsoever to do so, it has taken the necessary and proper steps to lower the height of the waters of Guanica Lake to its customary level and to guarantee that in the future the waters will not go beyond the customery level, and that this partnership has paid all the expenses of said works out of its own money."

Meantime, without waiting for the final decision of the Commission, Russell and Company, and South Porto Rico Sugar Company filed a bill in the District Court of the United States for the District of Puerto Rico to enjoin the Commission from proceeding in the matter, and upon dismissal of the bill by that court on July 13, 1928, appealed to the Circuit Court of Appeals for the First Circuit, which, October 26, 1928, affirmed the District Court's judgment (28 F. (2d) 820), holding (1) that the suit was premature, but also (2) that "the Public Service Commission had

jurisdiction." A copy of that opinion is in Appendix II (*infra*, pp. 45-50).

After that litigation was ended, and Russell and Company had afterwards filed their general answer with the Commission on November 27, 1928, as above stated (R. 26-28; *ante*, pp. 11-12), the Commission took testimony and heard argument and finally on March 7, 1929, its president presented a written report (R. 30-37) and the next day, March 8, 1929, the Commission approved the report and entered the order here in question, cancelling that part of the franchise held by Russell and Company, that is to say, that part relating to the use of the waters of Guanica Lake for irrigation purposes (R. 29-30).

STATUTES INVOLVED

FEDERAL:

(1) Section 32 of the Act of April 12, 1900, entitled "An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes", provided (31 Stat. 83-84):

> "Sec. 32. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: *Provided, however*, That all grants of franchises, rights, and privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same."

(2) Section 3 of Joint Resolution No. 23, approved May 1, 1900, referring to the statute last above quoted, provided in part (31 Stat. 715):

"Sec. 3. That all franchises, privileges or concessions granted under section thirty-two of said Act shall provide that the same shall be subject to amendment, alteration or repeal; * * *."

(3) Section 2 of the Organic Act for Puerto Rico (Act of March 2, 1917, 39 Stat. 951; 48 U. S. C. A. 737) provides in pertinent part:

"No law shall be enacted in Puerto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws. * * *.

"Private property shall not be taken or damaged for public use except upon payment of just compensation ascertained in the manner provided by law."

(4) Section 38 of the Organic Act for Puerto Rico (Act of March 2, 1917, 39 Stat. 964), as amended by Section 6 of the Act of March 4, 1927 (44 Stat. 1420-1421; 48 U. S. C. A. 750-753), provides in pertinent part:

"Sec. 38. That all grants of franchises, rights, privileges, and concessions of a public or quasi public nature shall be made by a public service commission consisting of a public service commissioner, who shall be the president of the said commission, and two associated commissioners, to be appointed by the governor with the advice and consent of the senate. * * * The said commission is empowered and directed to discharge all the executive functions relating to public corporations heretofore conferred by law upon the executive council and such additional duties and functions as may be conferred upon said commission by the legislature. * * *.

"The legislative assembly of Porto Rico is hereby authorized to enact laws relating to the regulation of the rates, tariffs, and service of all public carriers in Porto Rico, and the public service commission hereby created shall have power to enforce such laws under appropriate regulation."

PUERTO RICAN:

The Public Service Act of Puerto Rico (Act No. 70 of December 6, 1917; Laws of P. R. 1917, Vol. II, pp. 432-546), defines the powers of the Public Service Commission. Pertinent extracts therefrom and from an earlier Act of March 12, 1908, and from the Civil Code of Puerto Rico, appear in Appendix I hereto, *infra*, pp. 33-44.

OPINION OF THE INSULAR DISTRICT COURT

Russell and Company appealed to the insular District Court for the District of San Juan, which, on June 4, 1930, handed down a very careful opinion (R. 49-66) and entered its judgment the same day (R. 66-68) affirming the order of the Commission and dismissing the appeal. In the course of its opinion the District Court said (R. 54) that the three questions before it for decision were:

> "1. Whether the order appealed from, rendered by the Public Service Commission on March 8th, 1929, is reasonable or not.
> "2. Whether said order is legal or not.
> "3. Whether it has been based on incompetent evidence, affecting the decision and order of the Commission."

It found (R. 63-64) that:

> "The appellants do not allege that the order appealed from is based on incompetent evidence. The record shows that the Commission had before it abundant evidence offered by the parties, and that it handed its decision after considering said evidence. Neither in the petition for appeal nor in the brief for the appellants any error is assigned for admitting evidence which was legally incompetent and which materially affected the decision of the case."

It found that the second question "whether said order is legal or not" had been determined by the decision of the Circuit Court of Appeals in *South Porto Rico Sugar Company* vs. *Munoz, supra,* 28 F. (2d) 820, upholding the jurisdiction of the Commission, the opinion in which it quotes in full (R. 56-63). And it found that the Commission's order was "reasonable", saying (R. 65-66):

> "We adopt, with approval, the following statements contained in the brief for the Public Service Commission:
>
> " 'While it orders the cancellation of that part of the franchise which refers to the use of certain waters, it is at the same time liberal and benevolent as it leaves the parties in interest at liberty to file whatever new petitions with regard to the use of the waters they may deem wise and to submit to the Commission specific data as to the maximum height, as well as the drafts of any works that may be done to keep the waters at a permanent level.
>
> " 'Being compelled to take serious steps in order to protect the inhabitants and the owners of the valley of Lajas from the acts of the holder of the franchise, the Commission did the least it could do, namely: deprive them of the legal means with which they could continue causing injury, but at the same time it gave them a new opportunity for using the waters with the assurance that such state of affairs as the one which gave rise to the order appealed from would not be repeated.' "

OPINION OF THE SUPREME COURT OF PUERTO RICO

Russell and Company (or rather, Horace Havemeyer and the other five individual respondents here, as "members of the civil agricultural partnership of Puerto Rico, Russell and Company, Sucrs., S. en C."; R. 1-2; R. 68) appealed to the Supreme Court of Puerto Rico which, on November 9, 1933 (R. 82), affirmed the judgment of the

District Court of San Juan. The opinion of the insular Supreme Court (45 Dec. de Puerto Rico, *Spanish Ed.*, 698; *not yet published in the English edition*) is on pages 70 to 81 of the transcript of the record. It calls attention (R. 70-71) to the provisions (Section 84) of Puerto Rican Act No. 70 of 1917, "The Public Service Act of Puerto Rico",

> "that in all such cases the orders of the Commission shall be *prima facie* evidence of the reasonableness thereof; that the burden of proving the contrary shall be upon the appellant or appellants, and that if the court shall upon the record find that the order appealed from is reasonable and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the Commission."

After reciting the facts appearing from the certified copy of the record of the Commission "which was presented to the district court and is now before us" (R. 71), the opinion proceeds (R. 74):

> "The claim of Russell & Company that the Commission lacks jurisdiction to cancel or modify the franchise was raised by the corporation South Porto Rico Sugar Company before the United States District Court for the District of Puerto Rico, when in an injunction proceeding it prayed that the said Commission be restrained from interfering in the case. This petition was denied and on appeal the United States Circuit Court of Appeals for the First Circuit said:" * * * (quoting at length from the opinion of the Circuit Court of Appeals in the *South Porto Rico Sugar Company* case v. *Munoz, supra*, 28 F. (2d) 820; and then proceeding, R. 79), * * *—
>
> "The first three errors assigned by the appellant as committed by the court below claim that the Commission has no authority, power or jurisdiction to cancel or modify the said franchise, and merely expound them without argument, inasmuch as *this question has been decided by the Circuit Court of Appeals for the First Circuit, as we have already stated.*' (Italics supplied.)

It adds (R. 79-80);

> "It was neither claimed before the District Court nor before this court that the evidence admitted by the Commission in order to enter its decree is incompetent, for which reason the controversy is limited to a determination of whether such decree is reasonable or not and whether it is in accord with the law."

The court then discusses (R. 80-81) the evidence and the terms of the franchise and concludes (R. 81);

> "Consequently, we arrive at the conclusion that the order or decree of the Commission is reasonable and in accord with the law, inasmuch as appellant has failed to comply with the conditions of the franchise."

OPINION OF THE CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals (R. 89-104) upheld the power of the Public Service Commission to repeal the franchise,—(that part of the original franchise which had been assigned to Russell & Company, which is all that Russell & Co. held, and all that is involved here),—but held also that it was within the scope of its judicial power, and its duty, to review the *reasonableness* of the Commission's repealing order, and that, in its opinion (R. 102-104),

> "it was only necessary to amend or modify the franchise by requiring the establishment of a gauge above which the waters should not be permitted to be raised by the owner of the franchise, except during periods of extraordinary rains, and for a period sufficient to permit the excessive waters to be reduced in due course to the height of the gauge so established. * * * *
>
> "And it was, no doubt, with this in mind that the Commission postponed the taking effect of its order, which carried with it the implication that it would agree to an amendment of the franchise requiring the waters of the Lake to be maintained at or below a certain level, except during the period of excessive rains, which alteration or amendment we think it had the power to make; and while we cannot assume, notwithstanding the delay caused by the appeals, which we

think were taken in good faith, that the Commission will not act in fairness to the appellant allowing an amendment or modification of the franchise and grant a further extension of time in which they may file a petition requesting and consenting to an amendment to the franchise imposing a reasonable limitation of the height at which the waters of the Lake may be maintained, we nevertheless think a proper procedure in this case will be to reverse the judgment of the Supreme Court. The Commission may then proceed upon the evidence before it, and upon further investigation, establish a reasonable limitation upon the height at which the waters of the Lake may be maintained, and amend the franchise of the appellants so as to restrict their right to hold the waters back under normal conditions at a higher level than the height so fixed."

It also held (R. 89-90) that: "It is of no importance whether the individual members of Russell & Company are parties to this appeal"; and accordingly reversed the judgment of the insular Supreme Court and remanded the case "for further proceedings not inconsistent with this opinion, but without costs" (R. 104).

PETITIONER'S CONTENTIONS

Petitioners submit that a review of the *reasonableness* of the administrative or executive decision of the Public Service Commission to exercise the contractual right to repeal the franchise, which was reserved in granting it, is wholly outside of the scope of the judicial power of a constitutional court of the United States; that a question of the kind of "reasonableness" here involved, of a purely executive decision to exercise a contractual right of the government, is a wholly different kind of question of "reasonableness" from that involved in the exercise of the police power or the power of eminent domain, or of the government to take property or to cancel a franchise or to alter or amend it where a judicial question may arise of whether the executive authority, — public service commission or

other executive officer or authority, — has over-stepped the bounds of the police power or is attempting to take property without just compensation, or so to alter or amend a franchise as to destroy the essential character of the original grant so that its action may be charged to be "confiscatory" in character, where the words "reasonable", "reasonableness", are used by the court in attempting to draw the often shadowy line between action within the bounds of the executive power and action that oversteps those bounds and becomes confiscatory. Whether the executive authority has over-stepped the bounds is, of course, a judicial question. But that is a wholly different kind of question of "reasonableness" from a question whether the exercise of an existing contractual right of the government to repeal a franchise is the most sensible or just or appropriate manner of dealing with the situation. The latter is purely an executive problem, presenting no judicial question, and wholly beyond the scope of the judicial power.

In any event, the action of the Public Service Commission in this case was very reasonable; and was necessary in the public interest.

And these six individual respondents, — the appellants in the Circuit Court of Appeals, — are not themselves the *Sociedad en Comandita* Russell & Company, which alone claims title to this franchise. These six individuals had no standing to maintain an appeal from the insular Supreme Court to the Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

The principal question here presented of the scope of the judicial power of the United States, and of the power of a constitutional court of the United States to review the action of a public service commission in exercising a contractual right to repeal a public utility franchise, reserved to the government in the grant of the franchise, does not appear to have been directly decided by this court. It is

an important question of federal law, which it is believed this court should settle. It is believed that the decision of the Circuit Court of Appeals is untenable, and is probably in conflict with applicable decisions of this court. The question here presented, involving the nature and extent of the powers of the Public Service Commission of Puerto Rico, is of very great interest and importance to the people of Puerto Rico and to the insular government.

WHEREFORE, it is respectfully requested that this petition for a writ of certiorari be granted.

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BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the insular District Court of San Juan (R. 49-66) is not officially reported. The opinion of the Supreme Court of Puerto Rico (R. 70-81) is reported in volume 45, *Decisiones de Puerto Rico* (Spanish edition), p. 698. It has not yet appeared in the English edition of the Puerto Rico Reports. The opinion of the Circuit Court of Appeals (R. 89-104) is reported in 74 F. (2nd), 637.

A copy of the opinion of the Circuit Court of Appeals in the former case, the injunction suit brought by the South Porto Rico Sugar Company and Russell and Company to enjoin the Public Service Commission from acting in this matter (*South Porto Rico Sugar Co.* vs. *Munoz et al.*, 28 F. (2nd) 820), is in Appendix II, *infra*, pp. 45-50.

JURISDICTION

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered January 10, 1935 (R. 105). The time within which to apply for a writ of certiorari to this court was extended sixty days by order of Mr. JUSTICE BRANDEIS, until June 9, 1935 (R. 107).

QUESTIONS PRESENTED

The questions here presented are stated in the Petition (*ante*, pp. 2-3).

STATUTES INVOLVED

These are indicated in the Petition (*ante*, pp. 13-15; and Appendix I, *infra*, pp. 33-44).

STATEMENT

A statement of the case is in the Petition (*ante*, pp. 3-13).

SPECIFICATION OF ERRORS TO BE URGED

These are indicated under the headings "Questions Presented" and "Petitioner's Contentions" in the Petition (*ante*, pp. 2-3 and 19-20).

SUMMARY OF ARGUMENT

The action of the Public Service Commission repealing that portion of the original franchise held by Russell & Company was purely executive action. The franchise accepted by the original grantee contained the clause expressly reserving to the government the right to repeal it at any time. That was a contractual right, to be exercised in its discretion by the executive branch of the government. Its exercise involved no question of eminent domain, nor of the police power, nor of the extent of the government's powers, or of the executive powers of the Commission. The determination of the wisdom of exercising the government's right in that regard, and the action exercising it, were purely executive acts, involving no judicial question. Any question of the "reasonableness" of taking such executive action was purely a question of its wisdom from the administrative point of view; of whether that was the most sensible, just or appropriate manner of handling the problem and of relieving the situation brought about by the flooding of the lands in the Municipality of Lajas. It was purely an administrative question. That is a wholly different kind of question of "reasonableness" from the kind of question presented in the exercise of the power of eminent domain, or the police power, where the question of "reasonableness" involved is a question of exceeding governmental powers. But where, as here, the question of "reasonableness" involved, is merely a question of the wisdom of the executive authority in exercising administrative powers admittedly within its province, the court has no power to review the executive action.

In this case the Public Service Commission acted only after a full hearing, upon complaint of the Municipality of

Lajas, because the flooded condition of the lands in that municipality, destroying property of the inhabitants and endangering their health and comfort and safety, required some action. The floods were due to the wrongful act or neglect of the franchise holder, Russell & Company, in permitting the water in Guanica Lake to rise some three feet above the normal level to which the franchise contemplated it should be held. The added height of the water was manifestly to Russell & Company's advantage, permitting it to irrigate a larger area of its cane lands by gravity. The Commission's action was not only entirely within its powers under the franchise which expressly reserved the right to repeal it, but was also very reasonable. There was a full hearing; the Commission invited Russell & Company to submit plans for controlling the height of the water; and only upon the Company's failure to submit any plan did the Commission repeal the franchise. And the repeal order did not direct that it should take effect immediately, but allowed a period of more than ninety days before it should become effective, and invited Russell & Company to submit in the meantime, plans for controlling the height of the water, with a view to a new franchise embodying such plans and properly providing against destructive floods.

For the court to undertake to review the wisdom of the Commission in the course it followed, and to say as does the Circuit Court of Appeals in its opinion that there is some other better way, and to dictate the course the Commission is to follow, is simply to undertake to review the exercise of executive discretion; to substitute the opinion of the Judges for that of the Members of the Public Service Commission; and is a plain trespass by the judicial power upon the field of the executive.

In our form of government, the separation between the fields of the three great departments of the government is basic and vital. It is essential that it be respected, and that neither of the departments trespass upon the field of

the others. The opinion of the Circuit Court of Appeals violates that rule. It is believed that the Judges of that Court, sitting in Boston, far removed from the local situation in Puerto Rico, are not as well fitted as are the members of the Public Service Commission in touch with the local situation there in Puerto Rico, to determine the wisdom or the necessity of the exercise of the executive power vested in the Commission to repeal the franchise.

Th Circuit Court of Appeals should have dismissed the appeal for want of jurisdiction, as moot; because it was not brought by Russell & Company, *Sociedad en Comandita,* the sole claimant of the franchise, but by these six individual appellants (respondents here). While they may be members of the *Sociedad,* they are not the corporate entity, and a judgment for or against them cannot bind it. Nor have they in their individual capacities any right or ownership in the franchise, nor any property interest in it upon which to maintain the appeal from the judgment of the insular Supreme Court. The judgment of the Circuit Court of Appeals should be reversed with directions to dismiss the appeal from the insular Supreme Court for want of jurisdiction; or else the judgment of the Supreme Court of Puerto Rico affirmed.

ARGUMENT

POINT I

The order of the Public Service Commission of Puerto Rico repealing the franchise was executive action; and was within the scope of the Commission's power.

It is believed that there can be no question of this. The Circuit Court of Appeals so held (96-100) affirming to this extent the opinions of the Supreme Court of Puerto Rico and of the insular District Court of San Juan; and it had likewise so held in the earlier case in which South Porto Rico Sugar Company and Russell & Company sought to enjoin the Commission's action. (*South Porto Rico Sugar*

Company vs. *Munoz,* 28 F. (2nd) 820, October 26, 1928; Appendix II, *infra,* pp. 45-50). The repeal was in accordance with an unconditional right to repeal the franchise reserved in the original grant (Par. XVIII, R. 15; *ante,* p. 5) in accordance with the requirement of the Act of Congress that such a reservation be inserted in every such franchise granted in Puerto Rico. Section 3 of Joint Resolution No. 23, May 1, 1900, 31 Stat. 715; Section 38 of the Organic Act for Puerto Rico, March 2, 1917, 39 Stat. 954 as amended; *ante,* p. 3.

And the Commission's action was none the less purely executive in character, although for some other purposes the Commission might be clothed with apparently legislative or *quasi*-judicial powers. *Prentis vs. Atlantic Coast Line,* 211 U. S. 210, 228.

Plainly the determination whether or not to exercise the government's power to repeal the franchise is an exercise of executive power. It is not the making of a rule of action and is, therefore, not legislative in character; and it is not a decision upon the existence of a right determined by a fixed existing rule of law because it involves the exercise of discretion whether or not to act as seems wiser and in the better interest of the public under all the circumstances. It must, therefore, be executive in character. As this Court said in the Philippine "Board of Control cases" (*Springer* vs. *Philippine Islands,* 277 U. S., 189, 202-203):

> "The fact that they do not fall within the authority of either of these two constitutes logical ground for concluding that they do fall within that of the remaining one of the three among which the power of government are divided."

POINT II

The Commission's action was wholly reasonable.

The franchise-holder's fault permitting the waters impounded in the Lake to rise to a point where they were widely flooding the neighboring Municipality of Lajas, and

the Commission having vainly invited the franchise-holder by its interlocutory order of December 17, 1928, to:

> "prepare a draft of the work to be done with the object of lowering the level of the waters of the Lake * * * it being understood that this * * * is purely and simply an emergency measure, whose principal object is to remedy the immediate situation of the zone in question, and that this in no wise will prejudice the questions involved in this case" (R. 46-49, at p. 48),

without receiving any reply or aid from the Company the Commission, nearly four months later entered its order on March 8, 1929, repealing the franchise, *but did not make its order effective for another three and one-half months,* until June 30, 1929, directing (R. 29-30):

> "Provided that this cancellation shall become effective June 30, 1929. *It is understood, furthermore, that in the meantime the parties in interest are at liberty to file any further petition* which they may deem convenient for the use of the waters of Guanica Lake, by submitting to this Commission specific data with regard to the highest level of the waters of the Lake, as well as the plans of any other works, in order that this level may be permanently kept."

It is respectfully submitted that the District Court was right when it said in its opinion (R. 65; *ante,* p. 16):

> "We adopt, with approval, the following statements contained in the brief for the Public Service Commission:
>
> "The order appealed from by itself shows its reasonableness.
>
> "While it orders the cancellation of that part of the franchise which refers to the use of certain waters, it is at the same time liberal and benevolent as it leaves the parties in interest at liberty to file whatever new petitions with regard to the use of the waters they may deem wise and to submit to the Commission specific data as to the maximum height, as well as the drafts of any works that may be done to keep the waters at a permanent level.

"Being compelled to take serious steps in order to protect the inhabitants and the owners of the valley of Lajas from the acts of the holder of the franchise, the Commission did the least that it could do, namely: deprive them of the legal means with which they could continue causing injury, but at the same time it gave them a new opportunity for using the waters with the assurance that such state of affairs as the one which gave rise to the order appealed from would not be repeated."

POINT III

Since the Commission's order repealing the franchise involved nothing but the exercise of executive discretion vested in the Commission, it is not subject to review of the courts.

It is well settled that the review of administrative or executive action (or of legislative action) does not lie within the scope of the judicial power; and cannot be conferred upon a constitutional court of the United States, even by direct Act of Congress. This Court said in *Keller* vs. *Potomac Electric Co.*, 261 U. S. 428, 444:

"Such legislative or administrative jurisdiction, it is well settled, cannot be conferred on this court either directly or by appeal. The latest and fullest authority on this point is to be found in the opinion of Mr. Justice Day, speaking for the court in *Muskrat v. United States*, 219 U. S. 346. The principle there recognized and enforced on reason and authority is that *the jurisdiction of this court and of the inferior courts of the United States* ordained and established by Congress under and by virtue of the third article of the Constitution, *is limited to cases and controversies* in such form that the judicial power is capable of acting on them, *and does not extend* to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this court without real parties or a real case, or to *administrative* or legislative *issues or controversies.*" (Italics ours.)

A.—In any event, the question of the *reasonableness* of

the order of the Public Service Commission is one of *local law,*—or rather is a mixed question of fact and of local law,—in which this court will ordinarily not interfere, but will follow the decision of the territorial Supreme Court, unless it is "clearly erroneous".

Trujillo v. *Rodriguez,* 233 Fed. 208.
Richardson v. *Fajardo Sugar Co.,* 237 Fed. 195.
Graham v. *O'Ferral,* 248 Fed. 10.
Henna v. *Sauri and Subira,* 237 Fed. 145.
Cardona v. *Quinones,* 240 U. S. 83.
Sola v. *Cintron,* 237 Fed. 61.
Ibanez v. *Hongkong, etc., Bkg. Corp.,* 246 U. S. 621, 627 (Phil. Appeal).
Garcia v. *Hernandez,* 270 Fed. 455.
Castle v. *Castle,* 281 Fed. 609 (Hawaii).

B.—The order of the Public Service Commission in the present case, and the judgments of the insular District Court of San Juan, and of the insular Supreme Court, affirming it, are certainly not "clearly erroneous" within the meaning of the foregoing rule. To the contrary, the order was clearly right, and very reasonable. Attention is invited to what the insular District Court said on this point, adopting with approval the language of the brief filed in that court on behalf of the Public Service Commission (R. 65-66) hereinbefore quoted ("Statement", *ante,* p. 14).

POINT IV

The judgment of the Circuit Court of Appeals should be reversed because these individual respondents, Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and Henry B. Orde, had no standing to maintain an appeal to that court.

This record does not show any ownership or claim of ownership in these six individuals in the franchise here involved. The claim of ownership is in Russell & Company, Suers., S. en C. (*Answer of Russell and Company before the Commission,* Par. I, R. 26-27), a *sociedad en comandita*

of Puerto Rico, a juridical entity of the category expressly declared by Section 2 of the Public Service Act of Puerto Rico (Act No. 70, Appendix I, p. 33, *infra;* Laws of Puerto Rico, 1917, Vol. II, p. 433, *Spanish text,—"las personas* naturales o *juridicas"*) to be capable of being "Public Service Companies" under that act. And this court, some months before the appeal was taken on November 9, 1933 (R. 82) from the judgment of the insular Supreme Court to the Circuit Court of Appeals, had decided, in the case of *People of Puerto Rico* vs. *Russell and Company,* 288 U. S. 476, March 13, 1933, that this very *sociedad en comandita,* Russell and Company itself, was to be treated as a corporation for the purposes of the jurisdiction of the federal courts, and not as a partnership.

It follows that the corporate body, the *sociedad en comandita,* is a necessary party to these proceedings; and that these six individuals may not substitute themselves for it, even though they may claim that they are its only members. Judgment against them would not bind the corporate entity. *Their appeal to the Circuit Court of Appeals really presented nothing but a moot case.* These respondents are not the owners of the property involved.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed, and respondents' appeal to that court from the insular Supreme Court should be dismissed as moot, in the absence of the necessary party, Russell and Company, Sucrs., S. en C., or else the judgment of the insular Supreme Court should be affirmed. The order of the Public Service Commission of Puerto Rico repealing the franchise was clearly within its jurisdiction. The question of the reasonableness of its exercise of its executive power to repeal the franchise pursuant to the contractual right reserved to the government is not within the scope of the

judicial power of a constitutional court of the United States; but even if it were, the order was clearly right and very reasonable.

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